



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**  
Washington, D.C. 20460

OFFICE OF  
GENERAL COUNSEL

December 28, 2020

Justin G. Wolfe  
General Counsel  
Florida Department of Environmental Protection  
3900 Commonwealth Blvd M.S. 35  
Tallahassee, FL 3239

Re: Effective Date of EPA's Approval of Florida's Application to Assume Administration of the  
Clean Water Act Section 404 Program

Dear Mr. Wolfe:

As you know, on December 17, 2020, EPA approved Florida's request for authorization to assume jurisdiction over permitting under Section 404(g) of the Clean Water Act of 1972 ("CWA"), 33 U.S.C. § 1344, in waters of the United States. On December 22, 2020, EPA published notification of its approval of the program in the Federal Register, which stated that "Florida's program assumption will be applicable December 22, 2020." 85 Fed. Reg. 83,553 (Dec. 22, 2020). That same day, EPA received a letter from Earthjustice questioning the effective date of Florida's 404 assumption. I am writing to reaffirm that, as of December 22, 2020, Florida's program is in effect.

The applicability date of December 22, 2020 is consistent with the CWA, its implementing regulations, and the Administrative Procedure Act ("APA"). CWA Section 404(h)(2)(A) provides that if EPA determines, based on a state program submittal, that a state has the requisite authority to administer the Section 404 program, EPA shall approve the program and so notify the state and the US Army Corps of Engineers ("Corps"). As soon as the state notifies the Corps that it is administering the program, the Corps must suspend issuance of permits for activities with respect to which the state may issue permits. 33 U.S.C. § 1344(h)(2)(A). On December 23, 2020, Florida notified the Corps that effective December 22, 2020, FDEP is administering the Section 404 program as approved by EPA.

EPA's regulations implementing CWA Section 404(h)(2)(A) clarify the process through which a state program becomes effective and ensure transparency through Federal Register publication. Specifically, pursuant to EPA's regulations, if EPA approves the state's Section 404 program, EPA notifies the state and the Corps of its decision and publishes notice in the Federal Register. Transfer of the program to the state "shall not be considered effective until such notice appears in the Federal Register." 40 C.F.R. § 233.15(h). Pursuant to the regulatory requirements, EPA notified the state and the Corps of its approval, and the program became effective on December 22, 2020 (the date that notice was published in the Federal Register).

The applicability date of December 22, 2020 also is consistent with the requirements of the APA. Under that statute, a “rule” includes “statements of general or particular applicability and future effect” that “implement, interpret, or prescribe law or policy.” 5 U.S.C. § 551(4). By contrast, an “adjudication” refers to an “agency process for the formulation of an ‘order.’” *Id.* at § 551(7). “[O]rder” means the whole or part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing . . . .” *Id.* § 551(6). Agencies may use adjudications to apply general rules to address specialized or fact-specific questions. *See SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). EPA’s approval of Florida’s Section 404 program was an adjudication, not a rulemaking, that applied the existing requirements of CWA Section 404 and 40 C.F.R. part 233 in assessing Florida’s application to assume the program. Therefore, the APA’s requirement that the effective date of a rule generally be delayed for 30 days, 5 U.S.C. § 553(d), does not apply to EPA’s approval. Rather, the adjudication was immediately effective pursuant to the program effective date process laid out in the CWA and implementing regulations cited above.

For the same reason that the APA’s requirements related to a rule’s effective date do not apply to EPA’s approval of Florida’s Section 404 program, the statutory and regulatory requirements requiring rule codification also do not apply. The Federal Register Act requires codification in the Code of Federal Regulations for agency documents “having general applicability and legal effect . . . and . . . relied upon by the agency as authority.” 44 U.S.C. § 1510(a). EPA’s approval of Florida’s program is not an agency rule “having general applicability and legal effect,” but rather is an adjudication that applies general rules to Florida’s specific program assumption application. The C.F.R. codification requirement therefore does not apply to EPA’s approval of Florida’s program.

EPA has stated that it intends to codify the approved program in the C.F.R. 85 Fed. Reg. 57,853 (Sept. 16, 2020) (“If EPA approves this program, EPA will also codify the approved program in 40 C.F.R. 233 subpart H.”). However, as explained above, EPA’s approval has taken effect pursuant to the relevant provisions of the CWA and EPA’s regulations and is not contingent upon the forthcoming codification. EPA’s plan to codify the program is for the sole purpose of ensuring transparency and clarity about Florida’s program for the public, as well as for consistency with the Agency’s past practice in approving states’ applications for Section 404 program assumption, not because its approval is a rule that requires C.F.R. publication. Because EPA is not required to codify its approval in the C.F.R., and such codification is immaterial to the effective date of EPA’s approval, the fact that it is not yet codified is irrelevant for purposes of the effective date of Florida’s Section 404 program.

Congratulations on Florida’s assumption of the Section 404 program. We look forward to cooperating with you in EPA’s oversight capacity to ensure the protection of Florida’s aquatic resources consistent with the requirements of the CWA. If you would like to discuss further any of the topics discussed in this letter, please do not hesitate to contact me.

Sincerely,

DAVID  
FOTOUHI

David Fotouhi  
Acting General Counsel

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